INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulation involved	3
Statement	3
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	18
Appendix A	19
Appendix B	23
Appendix C	27

CITATIONS

Cases:	
Ayers, In re, 123 U. S. 443	8, 10
Beaston v. *Farmers Bank*, 12 Pet. 102	14
Belknap v. *Schild*, 161 U. S. 10	10
Compagnie Generale T. v. *Governor of the Panama Canal*, 90 F. (2d) 225, certiorari denied, 302 U. S. 720	8
Cummings v. *Hardee* (App., D. C)., decided Jan. 23, 1939	9
Cunningham v. *Macon, etc., R. Co.*, 109 U. S. 446	11, 12
Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251	18
Haskins Bros. & Co. v. *Morgenthau*, 85 F. (2d) 677, certiorari denied, 299 U. S. 588	13
Inland Waterways Corp. et al. v. *Hardee*, No. 629, present term	8, 13, 14
International Postal Supply Co. v. *Bruce*, 194 U. S. 601	10
Louisiana v. *Jumel*, 107 U. S. 711	10
Marion v. *Sneeden*, 291 U. S. 262	14
Minnesota v. *United States*, No. 73, present term, decided Jan. 3, 1939	17
Morrison v. *Work*, 266 U. S. 481	11
O'Connor v. *Rhodes*, 79 F. (2d) 146, aff'd, 297 U. S. 383	5, 18
Oregon v. *Hitchcock*, 202 U. S. 60	10
Osborn v. *United States Bank*, 9 Wheat. 738	12, 13
Stanley v. *Schwalby*, 162 U. S 255	11
United States v. *Lee*, 106 U. S. 196	11
United States ex rel. Goldberg v. *Daniels*, 231 U. S. 218	10

125899—39——1

Statutes:

	Page
Act of April 28, 1904, c. 1758, 33 Stat. 429	7
Act of June 25, 1910, c. 386, 36 Stat. 814, as amended (39 U. S. C., Secs. 759, 766)	11, 16, 21
Act of August 24, 1912, Sec. 2 (48 U. S. C., Sec. 1309)	8
Act of August 21, 1916, c. 371, 39 Stat. 528 (48 U. S. C., Secs. 1324, 1325)	16, 17, 20
Act of September 21, 1922, c. 370, Sec. 11, 42 Stat. 1008 (48 U. S. C., Sec. 1324)	20
Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a)	11, 20
R. S., Section 5497 (Criminal Code, Sec. 96; 18 U. S. C., Sec. 182)	3, 22
R. S., Section 5153 (12 U. S. C., Sec. 90)	14, 15, 16, 19

Miscellaneous:

Annual Report of the Isthmian Canal Commission:	
1913	17
1914	17
1915	17
Circular No. 660–2, Office of the Governor of the Canal Zone	17, 23
Cong. Globe, 38th Cong., 1st Sess., pp. 2125, 2206	15
H. Rept. No. 1083, 67th Cong., 2d Sess	17
20 Op. A. G. 133	8
26 Op. A. G. 113	7

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 628

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, PETITIONERS

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on October 31, 1938, which affirmed an order entered by the United States District Court for the District of Columbia striking parts of the petitioners'

answer and entering a decree against them *pro confesso.*

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 23–24). The opinion of the Court of Appeals for the District of Columbia (R. 27) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered October 31, 1938. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Funds of the Canal Zone, principally derived from its postal service, were deposited by the Secretary of War in the District National Bank, under an agreement securing the deposit. After insolvency of the bank the full amount of the deposit with interest was paid back from the proceeds of the security. The receiver, assailing the validity of the agreement to give security, brought this suit to recover that part of the deposit which exceeded the dividend paid general creditors. Two principal questions arise:

1. Is the United States an indispensable party defendant?

2. Under the circumstances of this case, was the giving of security by the national bank invalid?[1]

STATUTES AND REGULATION INVOLVED

The applicable portions of the statutes and regulation involved are set forth in Appendices A and B, respectively, *infra,* pp. 19–22, 23–26.

STATEMENT

On August 18, 1914, the then Secretary of War opened two deposit accounts in the District National Bank, one designated "Secretary of War, Canal Zone Funds, Call Account," and the other "Secretary of War, Canal Zone Funds, Checking Account" (R. 2–3). Those deposits were made pursuant to a contract of the same date entered into between the then Secretary of War and the bank (R. 8–11).

The contract provided, in effect, that the bank would deposit with the General Purchasing Officer of the Panama Canal bonds of a sum not less at any time than the amount of moneys and funds deposited under the agreement (R. 10). Those bonds were deposited in the vaults of the American Security & Trust Company (R. 10). The bank fur-

[1] For sake of simplicity, these questions are stated broadly, without detailing the sub-arguments (particularly as to question 2).

If certiorari is granted, it is proposed to consider also the question whether, if the deposit was invalid, under R. S. Sec. 5497, *infra*, p. 22, the bank became a trustee *ex maleficio* of the funds here involved.

ther undertook that if it failed to perform all provisions of the deposit agreement, the bonds were to become the property of the Secretary of War, and might be either retained by him or sold and the proceeds realized from such sale applied to the liquidation of any amount due under the contract (R. 10).

On March 5, 1933, the bank was closed by Proclamation of the President of the United States (R. 2, 13). It never reopened, and was found and determined to be insolvent by the Comptroller of the Currency, who appointed a conservator on March 14, 1933, and later, on November 6, 1933, a receiver was appointed (R. 2, 13). At the time of the suspension of the bank the credit balance in the Call Account amounted to $200,000, and the balance in the Checking Account amounted to $14,739.80 (R. 2, 3, 13). These deposits were almost entirely composed of deposit money order funds and money order funds received by the Canal Zone postal service (R. 14). The par value of the securities deposited to insure those deposits was at that time $274,200 (R. 3, 13).

After the closing of the bank, the securities pledged were sold to the Hamilton National Bank of Washington under an agreement by the Secretary of War and the General Purchasing Officer with the then conservator of the District National Bank, whereby the Secretary of War was paid from the proceeds of said sale $214,739.80, representing the credit balances on the two deposits, and

$3,535.37, representing interest on the deposits (R. 3, 13). The Comptroller of the Currency was aware of the proposed sale and sanctioned and approved it (R. 15–16).

On June 4, 1936, the receiver of the District National Bank brought suit against the Secretary of War to recover that part of the deposits which represented an amount in excess of the dividends paid to general creditors.[2] The petitioners filed an answer, and the respondent moved to strike certain portions of the answer and for the entry of a decree *pro confesso* (R. 22–23). The motion was granted, and judgment was entered against the petitioners (R. 23–24). On appeal, the Court of Appeals for the District of Columbia affirmed the judgment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit account

[2] A suit involving many of the issues here presented was commenced by a depositor of the Commercial National Bank of Washington, D. C. It was considered by the court below in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, wherein it was held that assets pledged to the Fleet Corporation and to the Attorney General as Alien Property Custodian might be recovered. This Court granted certiorari, but limited the writ to the question of the right of a depositor to institute suit without prior demand being made to institute such suit on the receiver and the Comptroller of the Currency. That right was affirmed. *O'Connor* v. *Rhodes*, 297 U. S. 383. On remand, the District Court is holding the *Rhodes* case in abeyance pending the outcome of the present suit.

which was made up of moneys received from deposit money order accounts and postal money order accounts of the Panama Canal.

2. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

3. In failing to hold that the laws applicable to postal money order accounts in the United States were also applicable to the postal accounts of the Canal Zone.

4. In failing to hold that the moneys in question were public moneys of the United States.

5. In failing to hold that the United States is an indispensable party to this suit.

6. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

7. In affirming the judgment against the petitioners.

REASONS FOR GRANTING THE WRIT

The Secretary of War entered into an agreement with the District National Bank to secure deposits of Canal Zone funds. After the insolvency of the bank, the full amount of the deposit, with interest, was made available to the Secretary of War from the proceeds of the security. The lower court gave judgment for the receiver upon his suit to recover that part of the deposit which exceeded the dividend paid to general creditors. The two principal

questions, broadly stated, are whether the suit should have been dismissed because the United States is an indispensable party defendant, and whether the agreement to give security is valid.[3]

1. In holding the suit not one against the United States, and in failing to regard the United States as an indispensable party, the court below failed properly to apply the decisions of this Court.

The decree entered by the court below against the Secretary of War, based upon his official authority over the Canal Zone as delegate of the President (see 26 Op. A. G. 113),[4] in effect permitted

[3] If certiorari is granted, it is proposed also to argue that if the deposit was not valid, because the bank was not a designated depository, the bank became a trustee *ex maleficio* of the deposit, so that its repayment did not constitute a preference.

[4] The Act of April 28, 1904, 33 Stat. 429, authorized the President to take possession of the 10-mile strip, "the Canal Zone," and provided that until the expiration of the 58th Congress, all powers as well as the power to make rules and regulations necessary for the Government of the Canal Zone should be vested in such persons and exercised in such manner as the President may direct.

By letter of May 9, 1904, to the Secretary of War, the President directed that all governmental power in the Canal Zone, vested in the Isthmian Canal Commission, should be exercised under the supervision and direction of the Secretary of War, and authorized the Commission to make all needful rules and regulations for the government of the Zone, subject to the approval of the Secretary of War. In 1904 the Commission passed an act establishing a postal service, and in 1906, a resolution establishing a money order system.

Although the Act of April 28, 1904, read "until the expiration" of the Congress, Congress passed no further legislation

respondent successfully to maintain a suit against the United States. Cf. *Compagnie Generale T.* v. *Governor of the Panama Canal,* 90 F. (2d) 225 (C. C. A. 5th), certiorari denied, 302 U. S. 720. The case is one for the application of the doctrine requiring the dismissal for want of jurisdiction of suits brought against officers of the States or the United States, in their official capacity and not because of their individual or personal interest, seeking relief actually operative against the government they represent. *In re Ayers,* 123 U. S. 443, 489, 506.

The court below was not clear as to its reason for not applying the rule. The opinion in the companion case, *Inland Waterways Corp. et al.* v. *Hardee,* No. 629 (R. 106), states that the proceeds of the pledge do not belong to the United States and have not been covered into the Treasury, so that the Secretary of War, having participated in a conversion of the bank's assets, must restore the sum received from the proceeds of the sale of the bonds "just as any other person who had participated in a preferential transfer would be compelled

for eight years. In the meanwhile, according to 20 Op. A. G. 133, the President was authorized to discharge the obligation of the United States under the treaty with Panama to provide a government for the Territory. The Act of August 24, 1912 (Panama Canal Act), Section 2, 48 U. S. C., Sec. 1309, ratified and confirmed all regulations, etc., promulgated within the Canal Zone by order of the President.

to respond" (No. 629, R. 119). If this language is taken to hold the Secretary personally liable for the tort committed at the time of the transfer of the pledged assets, the decision is manifestly erroneous, since Secretary Woodring did not participate in the alleged preference and was substituted as party defendant in the place of George H. Dern, deceased, after the present proceedings had been begun (R. 12).[5]

However, in the subsequent opinion in *Cummings* v. *Hardee,* January 23, 1939, *infra,* Appendix C, p. 27, the court dismissed the suit brought by the receiver to recover preferential payments made by the Commercial National Bank to the Attorney General as successor in interest to the Alien Property Custodian, on the ground that the defendant was not subject to any personal liability and that the money had been covered into the Treasury. The court distinguished the present case as involving moneys not covered into the Treasury and therefore concerned with the recovery of a specific *res* unlawfully in the custody of an official of the Government. The court apparently conceived that since the Secretary of War had control of the fund, he could be sued "in his official capacity in a possessory action."

[5] At the same time petitioner H. A. A. Smith, having succeeded the decedent Arthur L. Flint as General Purchasing Officer and Chief of Washington office, the Panama Canal, was substituted in his stead (R. 12).

We submit that the principles stated by this Court show that the United States is an indispensable party. This may be seen simply from the fact that the judgment below takes the money not from petitioners personally but from the government they serve. *In re Ayers, supra; Oregon* v. *Hitchcock,* 202 U. S. 60, 68, 69.

The court below appreciates the doctrine of sovereign immunity where the money is covered into the Treasury. *Cummings* v. *Hardee, infra,* p. 27. The question may be more clear in such a case (*Belknap* v. *Schild,* 161 U. S. 10, 18; *Louisiana* v. *Jumel,* 107 U. S. 711), but the sovereign interest is not non-existent merely because the official receiving the money has not covered it into the Treasury. Though an officer has custody of property, the courts cannot compel him to surrender it in a proceeding in which the United States is not a party, if the property is in the possession of the United States as owner (*United States ex rel. Goldberg* v. *Daniels,* 231 U. S. 218), or if the interests of the United States will be affected (see *Belknap* v. *Schild, supra; International Postal Supply Co.* v. *Bruce,* 194 U. S. 601). Its interests are affected here, although the fund represents moneys received by the Canal Zone postal service from private parties. In the first place, Congress has authorized the use of revenue derived from the Canal Zone postal service to defray the expenses of

operating that service.[6] Moreover, the faith of the United States has been solemnly pledged to the payment of deposits,[7] and the United States may be an indispensable party in a suit brought nominally against its officers, although it has no direct pecuniary concern, and is involved as a guardian or trustee. *Morrison* v. *Work*, 266 U. S. 481.

The judgment below cannot be supported as a "possessory action." *United States* v. *Lee*, 106 U. S. 196, held that the putative owner of real estate could bring suit against governmental officers claiming possession under the United States. But such a suit is grounded against the individual official as a trespasser (see *Cunningham* v. *Macon, etc., R. Co.*, 109 U. S. 446, 452), and cannot conclude the United States or adjudicate its title. *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 271. In the present case, the judgment below compelling the payment of the money would operate effectively to dispose of any interest of the United States.

---

[6] Act of February 16, 1933, Sec. 1, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a), *infra*, pp. 20, 21.

[7] The Act of February 16, 1933, *supra*, note 6, provides that the Canal Zone Postal Service shall be governed by such rules of the U. S. Postal Service as apply to conditions in the Canal Zone. And under the Act of June 25, 1910, Sec. 16, c. 386, 36 Stat. 814 (39 U. S. C. Sec. 766) the "faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices * * *."

Nor is the judgment below supported by the decree in *Osborn* v. *United States Bank,* 9 Wheat. 738, for the restoration of money taken from the Bank. Notwithstanding an injunction restraining the auditor of Ohio and his agents from enforcing a tax statute against the Bank, $100,000 in specie and notes was forcibly seized by them, turned over to the state treasurer, and turned over by him, at least to the extent of $98,000, to his successor in office. In ordering the return of this $98,000, plus the payment of $2,000 by the collector himself, the Court pointed out that it was not entertaining a suit against the State but was merely enforcing the personal liability of the defendant officers, that the collectors were incontestably liable as trespassers, and that, conceding that the original injunction was not properly awarded, the successor in office to the treasurer, though not an original wrongdoer, was responsible in detinue for the money taken without authority and detained by him "in a specific form," i. e., left untouched in a trunk (pp. 868, 869).

This aspect of the case seems to have been disapproved by implication in *Cunningham* v. *Macon, etc., R. Co.,* 109 U. S. 446, where the Court explained the *Osborn* case on the ground that the money had been turned over in violation of the preliminary injunction (p. 455). This Court has apparently not again compelled an officer not subject to any personal liability as trespasser to perform the affirmative act of surrendering moneys

under his control as a governmental official. If the *Osborn* decision has any vitality in this regard, it is confined to the peculiar facts of that case upon which the Court relied heavily, especially the fact that the case involved particular specie and notes which were kept separate from all other property, were completely identifiable, and were thus susceptible of being the subject of an action in detinue. The present case does not represent the vindication of a right to specific real or personal property. No pretense is made of requiring the delivery of the precise property originally transferred to the Secretary of War.[8] The court below applied general trust concepts and considered petitioner Woodring as some sort of successor trustee of a constructive trust. The tracing of the *res*, if that was attempted,[9] was merely the means of determining the amount of the liability for a breach of trust. This remedy does not come within the narrow exception permitting a remedy by way of recapture of money from a governmental official. Cf. *Haskins Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 683, certiorari denied, 299 U. S. 588.

[8] The situation is even clearer in the companion case of *Inland Waterways Corp. et al.* v. *Hardee*, No. 629. There the bank yielded up the bonds pledged (R. 7). In their answer, petitioners Woodring and Smith denied that they or either of them "so hold said bonds." (R. 83.) The judgment merely required the payment of $368,327.71, subject to credits, with interest (R. 100).

[9] The judgment was simply for $207,361.41, subject to credits, with specified interest (R. 23).

2 a. In holding invalid the securing of the Canal Zone's deposit the court below decided in a way contrary to the long-settled administrative practice, an important question of banking law, affecting many agencies, which ought to be decided by this Court. It is submitted that the deposits made in this case are authorized under R. S., Sec. 5153, 12 U. S. C., Sec. 90, *infra,* p. 19, as deposits of "public money." [10] The court below construed this section to have limited application to deposits made by the Secretary of the Treasury or his agent. In *Marion* v. *Sneeden,* 291 U. S. 262, 267, the Court was primarily concerned with the lack of power of national banks generally to secure deposits, and merely noted in dictum that there was an exception as to deposits made by the Secretary of the Treasury, an exception not involved or precisely defined in that case.

The narrow interpretation of R. S., Sec. 5153 by the court below would seem to defeat the Congressional intent to protect all deposits of public moneys. Statutes protecting public moneys are to be liberally construed. *Beaston* v. *Farmers Bank,* 12 Pet. 102, 134. In this connection it may be noted that

[10] The admission in the answer (R. 20) that they are not "public moneys" was merely an affirmation that they had not been covered into the Treasury and were not under the control of the Secretary of the Treasury.

The funds of the other petitioners involved in the companion case *Inland Waterways Corp.* v. *Hardee,* were alleged to be public moneys (No. 629, R. 38, 39, 79).

the National Banking Act of 1864 was, in effect, the last of the legal tender Acts, and passed primarily for the benefit of the United States and not of the banks themselves or its depositors. Congressional Globe, 38th Cong., 1st Sess., pp. 2125, 2206. The public interest in the safekeeping of public funds is superior to the interest of private depositors. The provisions in R. S., Sec. 5153 are directory, not mandatory, and if the spirit and intent of the statute are carried out, it cannot nullify the entire transaction that the deposits and pledge were not "personally" made by the Secretary of the Treasury.

The decision below reverses a long standing administrative practice, initiated in respect of Panama Canal funds, January 19, 1909, by a contract, superseded by a contract of May 11, 1910, between the Secretary of War and the Commercial National Bank. The action of the Secretary of War in negotiating contracts for the giving of security to safeguard deposits was the subject of correspondence between both the Secretary of War and the Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury. The entering into the contract with the District National Bank was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury (R. 15). This practice was acted upon and adopted in respect of deposits of funds administered by other departments,

without challenge for more than twenty years (R. 15).

In addition to its force as administrative construction, the foregoing suggests that even if 12 U. S. C., Sec. 90 refers to the personal participation of the Secretary, his approval of the contracts under which the Canal Zone funds are deposited constitutes a compliance with that section.

b. In addition, the court below erred in failing to find a specific authority in the Secretary of War to enter into a contract requiring the District National Bank to secure deposits of Panama Canal money, particularly as applied to the deposits in this case, which were almost entirely composed of money-order funds and deposit money-order funds received by the Canal Zone postal service [11] (R. 14).

By the Act of August 21, 1916, Congress provided that "the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders" (39 Stat. 528). The court below agreed (No. 629, R. 117) that this

[11] Similar funds in the United States postal service may be deposited in a national bank, if that bank gives adequate security to insure the safety of the deposit. Act of June 25, 1910, Sec. 9, 36 Stat. 814, as amended, 39 U. S. C., Sec. 759. By analogy this right extends to the Secretary of War, for since 1904 by order and regulation the Canal Zone postal service has been made subject to rules of the United States postal service not inapplicable to conditions in the Canal Zone, a provision reenacted in Sec. 1 of the Act of February 16, 1933, *infra*, p. 20.

was an approval of the depositing of money-order funds under regulations, but was unable to discover regulations in this respect in existence at that time. The court wholly failed to consider the effect of the regulation prescribed by Circular No. 660–2, of April 1, 1914, Appendix B, *infra,* p. 23.[12] With respect specifically to money order, postal savings bank and other designated funds, article 3 of the regulation provides that the Collector "shall deposit same in depositories under the contracts entered into by the Secretary of War." The reference obviously included the contract of May 11, 1910, entered into between the Secretary of War and the Commercial National Bank, providing for the securing of deposits (R. 17, No. 629). It seems plain that this securing of the deposit was approved by the regulation and therefore by the Act of August 21, 1916. Further Congressional approval may be implied from the fact that it was informed of the specific fact that bonds secured the deposits in the Commercial National Bank and District National Bank.[13]

---

[12] This is not contained in the record, but was handed to the court upon the argument and was therefore available for consideration. *Minnesota* v. *United States*, No. 73, this Term, decided January 3, 1939.

[13] See particularly Isthmian Canal Commission, Annual Report for 1915, pp. 278, 279; and see also Report for 1913, p. 415; Report for 1914, p. 328; Letter from Mr. Baker, Secretary of War, to Speaker of the House of Representatives, September 12, 1919, printed in H. Rep. No. 1083, 67th Cong., 2d Sess., p. 15.

3. It is appreciated that in *O'Connor* v. *Rhodes*, 79 F. (2d) 146 (App. D. C.), affirmed, 297 U. S. 383, involving some of the questions here discussed, certiorari was limited to the question of the standing of the stockholder of the insolvent bank to bring suit to set aside a preference. But that case arose on motion to dismiss, and this Court may have considered that the questions of sovereign immunity and validity of the pledge could more appropriately be considered upon final decree (see *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258).

The objection that the United States is an indispensable party is not only jurisdictional but it relates to a matter in which the court below has departed from the principles stated by this Court. And the validity *vel non* of the giving of security for a deposit, involving as it does the right of a public officer to protect moneys coming into his possession in the course of official business presents a question having a far-reaching effect upon the method by which various governmental agencies conduct their financial affairs.

CONCLUSION

For the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JANUARY 1939.

APPENDIX A

R. S., Sec. 5153 (12 U. S. C., Sec. 90):

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

Act of August 21, 1916, c. 371, 39 Stat. 528 (48 U. S. C., Secs. 1324, 1325):

SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.[1]

SEC. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a):

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are nec-

[1] Three per centum by amendatory Act of September 21, 1922, c. 370, sec. 11, 48 U. S. Code 1324.

essary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

Act of June 25, 1910, c. 386, 36 Stat. 814, as amended (39 U. S. C., Secs. 759, 766):

SEC. 9. Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand: *Provided,* That no such security shall be required in case of such part of the deposits as are insured under section 264 of Title 12. The funds received at the postal savings depository offices in each city, town,

village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. * * *

SEC. 16. The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided.

R. S., Sec. 5497 (Criminal Code, Sec. 96; 18 U. S. C., Sec. 182):

Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

APPENDIX B

The Panama Canal

OFFICE OF THE GOVERNOR

Culebra, C. Z., *April 1, 1914.*

Circular No. 660–2.

Accounting Department

AUDITOR OF THE PANAMA CANAL

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their offices or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, records, and accounts of money and property in the possession of all

officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

DISBURSEMENTS—PAYMASTER

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refundments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

RECEIPTS—COLLECTOR

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts

due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and

refunding cash, such employees shall be subject to the direction of the Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7127

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, SUCCESSOR IN INTEREST TO ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES, APPELLANT

v.

CARY A. HARDEE, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., APPELLEE

Appeal from the District Court of the United States for the District of Columbia

(*Argued December 8, 1938. Decided January 23, 1939*)

Before GRONER, C. J., and MILLER and VINSON, JJ.

GRONER, C. J.: This is an appeal by Homer S. Cummings, Attorney General of the United States, as successor in interest to the Alien Property Custodian, from a final decree and order of the District Court granting the plaintiff's (appellee's) motion to strike certain parts of defendant's (appellant's)

answer and entering judgment *pro confesso* for the plaintiff. The suit was instituted by the receiver of the Commercial National Bank of Washington, D. C., against the Attorney General and a number of other defendants. In each case decree went for the receiver. The appeals of the defendants Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and others, were heard together and decided on a separate record by this court October 31, 1938.[1] The decrees were affirmed. In each case, including the present one, the purpose of the suit was to recover preferential payments made by the bank after insolvency. The bill alleged that each defendant had deposited sums of money with the bank, that the bank had unlawfully pledged part of its assets to each defendant to secure the deposits; that the bank thereafter became insolvent and a receiver was appointed to administer its assets, that the receiver, acting under mistake of law, redeemed part of the pledged assets at their full value; and that defendants sold the remaining part to satisfy the bank's indebtedness in full. The prayer of the bill in this case is that the defendant be declared trustee for the benefit of the receiver for the sums received from the sale and that the receiver have a decree for the amount thereof, with interest.

Admittedly the deposits were to the account of the Alien Property Custodian and consisted of money derived from two per cent. deductions from alien property, authorized by statute to be made

[1] *Inland Waterways Corporation, et al.* v. *Hardee, Receiver*, No. 7056, — F. 2d —.

upon return of the property to former enemy owners.[2]

The final decree of the District Court gave judgment against Homer S. Cummings,[3] Attorney General, as successor to the Alien Property Custodian, for the sum of $88,556.56, with interest from December 1, 1937, until paid, representing a balance of principal in the sum of $64,852.85 after deducting dividends at the rate paid unsecured creditors, and interest thereon in the sum of $23,703.71.

Nine grounds of error are relied on, but in the view we take of the case it is necessary to discuss only one of them.

The answer of the Attorney General alleged that the United States were the sole and absolute owners of the moneys deposited by the Alien Property Custodians in the bank and that the moneys were public moneys; that the moneys received from the sale of the pledged securities were when received deposited in the Treasury of the United States and credited to "Secretary's Special Deposit Account No. 8" and commingled with other funds of the United States; that this account is subject only to the check of the Secretary of the Treasury; that the Attorney General has not now and never has had the physical custody or possession of or any interest in the moneys received by the former custodian from the sale of the pledged securities. On these grounds the Attorney General insists that if the decree is to be considered one against him in his individual capacity, it is erroneous because he

[2] Trading With the Enemy Act, sec. 24, 11 F. C. A., Tit. 50, sec. 24 (25).

[3] Mr. Cummings resigned January 2, 1939.

admittedly had no individual interest in the subject matter and, if it is to be considered one against him in his official capacity, it is invalid because not authorized under any of the provisions of the Trading With the Enemy Act, as amended.

We think the first ground may be eliminated, for obviously the decree is only against the Attorney General as Acting Alien Property Custodian, and the judgment is in effect to require him to exercise his official control over alien property funds in the Treasury of the United States. The case in this aspect differs from the cases decided in October in at least one major respect. In the cases of the Fleet Corporation and Inland Waterways Corporation, although the deposits were moneys of the United States and the proceeds of the pledge had been covered into the Treasury, they were, as corporations, the actual wrongdoers, suable in their individual capacities and therefore liable to judgment for conversion of the illegal pledge; and in the case against the Secretary of War, as custodian of the postal funds of the Panama Canal Zone, the proceeds of the pledged securities were not moneys of the United States and had not been covered into the Treasury but were still in his possession and control, and the suit was therefore for the recovery of a specific *res* unlawfully in the custody of an official of the Government. In the present suit, as we have seen, not only is it alleged that the deposits in the bank were moneys of the United States, but the proceeds of the securities pledged to secure the deposits were deposited in the Treasury of the United States and commingled with the funds of the United States, and in this aspect the question

for decision is whether the District Court had jurisdiction to enter a decree for the restoration of the money—conceding the contract for deposit-security to have been illegal—without the consent of the United States to be sued. We think the answer to the question is to be found in our decision in *Haskins Bros. Co.* v. *Morgenthau,* 85 F. 2d, 677, 66 App. D. C. 178, cert. den., 299 U. S. 588. It is quite true that in the case of *O'Connor* v. *Rhodes,* 79 F. 2d, 146, 65 App. D. C. 21—which was a previous suit brought by a depositor of the Commercial National Bank against the Attorney General as Alien Property Custodian and a number of other defendants to recover on these same causes of action—we said on an appeal from a decree overruling defendant's motion to dismiss the bill:

> The occasion for naming the Attorney General as one of the defendants arose out of the fact that by an Executive order he became the successor in interest to the Alien Property Custodian. The bill alleges that the Custodian obtained from the receiver of the bank a sum of money in excess of that to which he was legally entitled, and the bill further alleges that the Attorney General has received and controls the money so illegally obtained by his predecessor. As we have already pointed out, the fund deposited in the bank by the Alien Property Custodian consisted of money made up by the deduction of 2 per cent. of the value of property and money of alien enemies under the general provisions of the Trading with the Enemy Act (50 U. S. C. A. Appendix, Sec. 1 et seq.). We have had occasion to notice the conditions under which the fund was accumulated by the Custodian, and we

> have always assumed that the fund was a guaranty fund to cover the expense of administration and that the balance after the payment of expenses, if any, would be returned to the several trusts and distributed to the owners. It is a fund exclusively under the control of the Acting Custodian. It is not money of the United States paid into the Treasury of the United States.

Hence we did not consider the suit as one against the United States. That case was subsequently dismissed, and the present suit for the same purpose was instituted by the receiver. But it should be observed that our former decision was based upon the facts appearing in the bill of complaint in that suit, and these facts showed that the fund being sued for—the proceeds of the pledge—was then a fund exclusively under the control of the Attorney General; that it was not money of the United States; was held by the Attorney General; and had not been covered into the Treasury of the United States and commingled with the moneys of the United States. The contrary appears on the appeal in the present suit. We do not, therefore, regard *O'Connor* v. *Rhodes* as establishing the law in this case or, in view of the circumstances, as controlling.

On the facts now shown, we think that the money deposited in the bank was unquestionably money of the United States, and that the judgment in this case can be satisfied only by payment of money out of the United States Treasury. As to the first proposition we did, as in the *O'Connor* case, express a contrary view in *Deutsche Bank* v. *Cummings*, 83 F. 2d 554, 65 App. D. C. 297. There we

said that legislation on the seizure of alien property, passed in the exercise of the war power of Congress, indicated no purpose of confiscating to the use of the United States enemy property found within the country; that, while the power to confiscate existed, it had never been exercised; and that, until exercised, the seizure and retention of alien property created only a trusteeship and did not change title. We thought we were justified in this conclusion by the language of the statutes and the declarations of the Executive Departments on the subject of confiscation, but on appeal to the Supreme Court (300 U. S. 115) our views were disapproved, and it was held that alien enemy owners were divested of every right in respect of money and property seized and held by the custodian during the war and that the title to the same upon seizure became absolute in the United States. In this view it follows (in the light of the facts here) that the suit to recover the proceeds of the pledge made to secure the deposit is in substance a suit against the United States. *Cummings* v. *Societe Suisse Pour Valeurs De Metaux*, 85 F. 2d 287, 66 App. D. C. 121; *Cummings* v. *Deutsche Bank*, 300 U. S. 115; *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603. Here, as we have pointed out, the deposits were made by a former Alien Property Custodian, and the bonds pledged as security had been held by a former custodian and converted by him into money which he deposited in the Treasury. The Attorney General did not demand the pledge, did not receive the security, and did not participate in the deposit of the proceeds of the pledged assets in the Treasury of the United States.

But the receiver insists that this is of no consequence since, as he claims, the proceeds of the pledge—though in the Treasury—are earmarked for "the account of the Attorney General, Alien Property Bureau", and are therefore subject to his order; and that, since the Alien Property Custodian has authority to pay the necessary expenses incurred by him in the general administration of his office, and since the original deposit in the bank was made in connection with the general administration of the Alien Property Bureau, the pledge of securities was correlative to the deposits; and that the sale of the securities and retention of the proceeds was an incident to general administration; and that consequently, since the money was wrongfully received, the repayment thereof is an obligation incurred by the Alien Property Custodian in the administration of his office, and the Attorney General, as his successor, has the power and duty to make repayment by withdrawal of a sufficient sum from the Treasury. But we think this conclusion by no means follows. Congress has specifically prohibited the payment of alien property money deposited in the Treasury except pursuant to the provisions of the Trading With the Enemy Act, as amended.[4]

[4] SEC. 7 (c) * * * The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property

Section 7 of the Act gave the Alien Property Custodian authority to seize enemy property and, as we have pointed out, the seizure when lawfully

---

Custodian or by the Treasurer of the United States (40 Stat. 1020).

SEC. 9 (a). That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the pay-

made transferred title absolutely to the United States. Section 9 (a), as supplemented by Section 30 (11 F. C. A., Tit. 50, sec. 24 (31)), gave to a nonenemy owner of property seized the right to recover it by suit in a federal court, and Section 7 (c) denied all other remedy. The Act, taken as

---

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (42 Stat. 1511.)

SEC. 30. Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia, as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, or any money or other property held by the Alien Property Custodian or by the Treasurer of the United States. (Oct. 6, 1917, c. 106, sec. 30, as added Mar. 10, 1928, c. 167, sec. 15, 45 Stat. 275.)

a whole, establishes a definite code in relation to seizure of enemy property.[5] As construed by the Supreme Court, its effect was by the seizure to transfer title from the alien to the United States, with a reservation, however, that if the seizure was erroneous and the property was not enemy-owned, its recovery could be secured in a suit brought by the owner against the Alien Property Custodian or the Treasurer as agents of the United States,—but forbidding a suit brought to recover the seized property or its proceeds in any other circumstances. If this is a correct construction of the Act, it is evident that consent of the United States to be sued in the circumstances we are considering is wholly lacking, for this is not a suit brought by a non-enemy owner to recover possession of property seized in the belief that it was enemy-owned, and in that case alone has Congress consented that the United States may be sued as to such seized property. This is a suit to recover the proceeds of securities unlawfully pledged to the custodian to secure deposits of money of the United States. These proceeds are no longer in the hands of the custodian but have been covered into the Treasury in accordance with the positive mandate of the Act,[6] and, since the United States have not consented to be sued except in accordance with Section 9 of the Act, we know of no way in which a suit

[5] All the statutes which relate to the seizure of alien property and its administration by the custodian are collected in 11 F. C. A., Tit. 50, sec. 24 (1), *et seq.* The original *Trading with the Enemy Act*, 40 Stat. 411 (1917), was amended from time to time and was supplemented by the *Settlement of War Claims Act*, 45 Stat. 254 (1928).

[6] Sec. 12, 11 F. C. A., Tit. 50, sec. 24 (12).

under the general equity jurisdiction of the court for their recovery can be maintained. *Crone* v. *Sutherland*, 63 F. 2d 895, 62 App. D. C. 16. If this were a suit for mandamus against the Attorney General to require him to withdraw the funds from the Treasury and restore them to the bank, it would not be sustainable for the reason that Congress has not conferred authority on the Attorney General to withdraw them, for the asserted right to the use of money in the payment of the expenses of administration is a far cry from the right to withdraw it in satisfaction of a judgment for a tortious conversion. *Reeside* v. *Walker*, 11 How. 271, 290. No principle is better established than that moneys in the Treasury can be withdrawn only by a Congressional appropriation. Referring to this in the *Haskins Bros.* case, *supra*, we said that the duties of the Secretary of the Treasury and the Treasurer are to receive and preserve the public money and not to disburse it except conformably to law; that as officers of the United States they have no right or estate in the public money, whether earmarked as a special fund or as part of the general fund; that they are in effect mandataries of a limited and defined commission. In that case, as in this, it was alleged that the earmarked fund in the Treasury was money belonging to the claimant, but in that case, as in this, it was in the Treasury and not in the hands of the officer who it was claimed had illegally exacted it. We answered this by saying that to require its withdrawal from the Treasury would be to usurp the legislative function of appropriation and that this could not be done.

Nor can the suit be maintained against the Attorney General, either personally or in his official capacity, on a showing that a predecessor in office had illegally collected the money and placed it in the Treasury. The Attorney General is not shown to have done anything in his personal capacity in relation to the matters out of which this suit arose. The events all occurred in the administration of a predecessor. The Attorney General did not receive the fund in the first instances and in this view he can not be charged personally in an action for money had and received. *Smietanka* v. *Indiana S. Co.*, 257 U. S. 1. Nor has he now possession of the fund, and so can not be sued in his official capacity in a possessory action, *Haskins Bros. Co.* v. *Morgenthau, supra,* at p. 683; and since under the provisions of the Trading With the Enemy Act he has no authority to withdraw the fund except for specified purposes named in the Act and there is no other law permitting its withdrawal, he can not be sued at all, for such a suit is in effect a suit against the United States. *Haskins Bros. Co.* v. *Morgenthau, supra.* It is obvious, therefore, that—without considering whether the bank has a right of action against the former Alien Property Custodian because it has been injured by his wrongful act—the present suit is necessarily one against the United States, and in that aspect it can not be maintained against an agent of the United States so long as he is acting as agent. The surveyor of the highways, who is a servant of the inhabitants of the county, is not responsible for the nonperformance of their duties or for the negligence of their servants though he is the person who acts for them, even though the inhabitants of the county can not themselves be

sued because they are not a body corporate. It is, therefore, in our opinion of no consequence whether the act of the former Alien Property Custodian was or was not lawful. The fact that he collected the proceeds of the pledged bonds and deposited these in the Treasury fixes the status of the money and renders the Attorney General impotent to withdraw it and disburse it unless and until directed to do so by an Act of Congress or until the United States shall submit to be sued to determine its disposition.

In our view the decision and decree of the lower court are wrong and should be, and are, reversed.

Reversed.

U. S. GOVERNMENT PRINTING OFFICE: 1959